IN THE UNITED STATES OF DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

CAPITOL RECORDS, INC., *et al.*,

Plaintiffs,

vs.

JAMMIE THOMAS,

Defendant.

Case No.: 06cv1497-MJD/RLE

Brief In Opposition to Defendant's Motion to Exclude Evidence of the Sound Recordings Deposited with the Copyright Office

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Plaintiffs, Capitol Records, et al., submit this brief in opposition to Defendant's motion to exclude evidence of the sound recordings deposited with the copyright office and state as follows:

Defendant argues that legitimate copies of CDs containing the copyrighted works at issue must be excluded under Rule 1002, the best evidence rule, because they are not the original, deposit copies submitted to the Copyright Office. Defendant's argument fundamentally misconstrues both the nature of the deposit copy, as well as the Federal Rules of Evidence. The idea that the legitimate CDs being proffered here, and offered in retail stores throughout the world, are not competent evidence of the contents of the copyrighted recordings is absurd. As explained below, deposit copies are simply that, copies, of the CDs in question, the same CDs being proffered here. Defendant has no evidence to dispute that and, as such, her argument fails.

Moreover, Defendant's argument fails, as a matter of law, for four reasons. First, Defendant cannot cite to a single statutory provision or case for the proposition that a copyright owner must enter into evidence the deposit copies of the sound recordings submitted to the United States Copyright Office, in order to prove that their copyrighted work has been infringed. Second, the CDs being proffered are originals under Federal Rule of Evidence 1001, and accordingly satisfy the best evidence rule. Deposit copies are just that, copies, of the published CDs and, as evidenced by the SKU code on the Form SR Copyright Registration, are identical to the legitimate CDs being proffered. Third, to the extent the best evidence rule is implicated, the legitimate CDs are admissible under Federal Rule of Evidence 1003 as duplicates. Defendant has raised no genuine question as to the authenticity of the original and it would not be unfair to admit the duplicate instead of the original. And fourth, to the extent any question remains regarding the best evidence rule, the decision whether the legitimate CDs satisfy the rule is a fact-finding determination left to the jury. Fed. R. Evid. 1008.

Moreover, as a practical matter, Defendant's argument is absurd on its face. The works at issue are popular, well-known sound recordings that have sold millions of copies, and are well-known by the public; it is absurd to argue that there can be any question that the CDs in question match the copyrighted recordings. Accordingly, Defendant's Motion should be denied.

I. FACTUAL BACKGROUND

The premise of Defendant's motion is that there is somehow something unique about the deposit copy of Plaintiffs' sound recordings on file in the United States Copyright Office. This is untrue. The deposit copies are simply two of a few thousand identical copies made in the first run of the CD. Accompanying this brief is a declaration describing the practice of submitting deposit copies and our understanding of the Copyright Office procedure with regard to preserving them. If necessary, Plaintiffs are prepared to offer live testimony with regard to their practice of submitting deposit copies.

Each track on an album is recorded in a studio, edited and mastered. When it is complete, a final "master" recording is created. Until recently when recordings were preserved as digital files, the master was a large audiotape reel. That master does not leave the studio. Instead, a copy of it is made at the studio and sent to a manufacturing facility. That copy is put together with copies of the other tracks intended for a particular album and an album is "pressed." The album is put together with a color booklet and placed in a case. Each album carries the record company's inventory or "SKU" number for that album. An initial manufacturing run of the album is made -- typically tens or hundreds of thousands of copies – for commercial sale. The album is shipped to retail accounts for distribution and a small number of copies are kept by the record company.

The company sends two of these copies to the United States Copyright Office for use as deposit copies of the album. These two copies are identical to each other and to the tens or hundreds of thousands pressed in the initial manufacturing run. The inventory number on the commercial copy of the album is listed on the copyright certificate. For example, the CD of the album "The Writing's On The Wall" by Destiny's Child bears the inventory number CK 69870 and that is listed immediately after the album number on the copyright certificate for that album.

For this reason, the Copyright Office has not until recently routinely kept deposit copies of commercial sound recordings after 5 years of release. Rather, it has only kept indefinitely so-called "unpublished works" – works for which the copyright holder retains the only copy in existence, other than the deposit copy. The reason that published works such as commercial sound recordings and unpublished works are treated differently is because in the case of unpublished works, the Copyright Office must serve an archival purpose in case the owner's copy is lost or altered.

The effect of this policy is that, it is likely that none of the deposit copies of the works at issue in this case would be available in the Copyright Office now as they are all more than 5 years old. *See* Declaration of Jennifer Pariser, attached as Exhibit A and June 15, 2009 email from David Carson, General Counsel, U.S. Copyright Office, attached as thereto (From the 80's until recently, the retention period for all published works other than visual arts was five years. In contrast, unpublished works must be retained for the entire term of copyright. "It has been my understanding that the differing treatment for deposits of unpublished and published works is due to the fact that published works are likely to have been distributed in large numbers of copies, many of which are likely to be locatable (e.g. in libraries) years after publication")

II. NOTHING DEFENDANT CITES SUPPORTS THE ASSERTION THAT A CERTIFIED DEPOSIT COPY IS NECESSARY TO PROVE INFRINGEMENT.

To state a claim for copyright infringement, Plaintiffs need only allege: (1) that they own valid copyrights, and (2) that Defendant violated one or more of the exclusive rights in 17 U.S.C. § 106 by, for example, copying or distributing Plaintiffs' copyrighted works. *See Kay Berry, Inc. v. Taylor Gifts, Inc.*, 421 F.3d 199, 203 (3d Cir. 2005) (citing *Dunn & Bradstreet Software Servs., Inc. v. Grace Consulting, Inc.*, 307 F.3d 197, 206 (3d Cir. 2002)); *ATC Distrib. Group, Inc. v. Whatever It Takes Transmissions Parts, Inc.*, 402 F.3d 700. 705 (6th Cir. 2005). *See also Feist Pub., Inc. v. Rural Tel. Serv. Co., Inc.,* 499 U.S. 340, 361 (1991) ("To establish infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original."); 4 Melville Nimmer & David Nimmer, NIMMER ON COPYRIGHT § 13.01, at 13-5 & n.4 (2002) ("Reduced to most fundamental terms, there are only two elements necessary to the plaintiff's case in an infringement action: ownership of the copyright by the plaintiff and copying [or public distribution or public display] by the defendant."). Nowhere in any of the Supreme Court or other case law regarding the requirements to establish a claim for infringement, is there a requirement that the copyright plaintiff produce the deposit copies of the copyrighted work.

Defendant cites only three sources of authority for her claim that certified deposit copies are necessary to establish infringement. However, none of the three support her position. First, *King v. Ames*, the primary case cited by Defendant, does not support her position that a certified deposit copy is required to establish infringement. In *King*, the court held that in order to prove copying, the plaintiff must offer the jury a comparison of the legitimate and infringing work. *King v. Ames*, 1997 WL 327019 (N.D. Tex. June 4, 1997). In that case, the plaintiff offered no competent evidence with which to compare the works. *Id.* at *6. Indeed, she simply testified as to the contents of the work submitted to the Copyright Office. *Id.* The Court held that this testimony was insufficient, without more, to establish "whether the works in which King claims a copyright interest are the same as those marketed by [Defendants]." *Id.* The Court concluded that "because the jury did not have ***any*** competent evidence before it with which to compare King's copyrighted recordings and the products of [Defendants], a finding of probative similarity cannot be sustained." *Id.* (emphasis added). While the court mentions the deposit copy as such competent evidence, it does not discuss whether other evidence would be admissible. That is because, in *King*, there was no evidence that the plaintiff published the work or that any other copy existed. The Fifth Circuit affirmed and held that that to prove actionable copying, "a side by side comparison must be made between the original and the copy to assess whether the two works are substantially similar." *King v. Ames*, 179 F.3d 370, 376 (5th Cir. 1999). Neither the district court nor the Fifth Circuit held that the plaintiff had to produce the actual Deposit Copy in order to compare with the infringed copy. Indeed, as demonstrated below, there is no legal or logical support for such a rule. Moreover, this side by side comparison of a legitimate copy and the infringed copy is consistent with FRE 1002 and 1003, which allow either the original or a duplicate to prove the contents of a recording.

Similarly, nothing in United State Copyright Office Circular Six (the "Circular") suggests that a Deposit Copy is required to prove infringement. *See* Circular, attached as Exhibit B. To the contrary, the Circular defeats this argument by warning that the Copyright Office does not retain all works deposited for copyright registration.[1] Indeed, from the mid 1980s until recently, as established above, the Copyright Office had a policy of discarding deposit copies after five years. *See* Pariser Declaration, Exhibit A; Carson Email, attached thereto. Accordingly, Defendant's argument would limit recovery to those recent registrations which the Copyright Office retained.

Defendant's reliance on Nimmer is similarly misplaced. While Nimmer notes that deposit *may* serve "a copyright as well as an archival function," Nimmer argues that a Deposit Copy cannot be required to prove infringement because there is no guarantee that the Deposit Copy will be retained and available. 2-7 M. & D. Nimmer, Nimmer On Copyright § 7.17[A], at 1(2002) ('"Nimmer"). Indeed, the Library of Congress need not add all deposited works to its collection and is not required to preserve those works which it does add to its collection, and those copies not added to the collection need only be retained "as long as considered practicable and desirable by the Register of Copyrights and the Librarian of Congress." *Id.* (citation omitted).

III. THE LEGITIMATE COPIES ARE THE BEST EVIDENCE.

A. Legitimate CDs Are Originals Under FRE 1001 And Accordingly Satisfy F.R.E. 1002.

Under Federal Rule of Evidence 1001, an "'original' of a writing or recording is the writing or recording itself. . . . An 'original' of a photograph includes the negative or any print therefrom.'" Fed. R. Evid. 1001(3). In this case, the CDs being proffered are the recording themselves. The analogy to a photograph could not be clearer. In the case of a photograph, both

[1] The Circular further warns that "the Library [of Congress] may or may not retain in its collections deposits transferred from the Copyright Office." Circular at 3.

the negative and all prints therefrom are originals. *Id.* Similarly, both the master recording of the sound recordings at issue, as well as the printed CDs made therefrom, are originals. In fact, as explained above, the deposit copies are simply two copies of the first run of the CD and, therefore, by definition are identical "originals" of the legitimate CDs being proffered. As such, the legitimate CDs satisfy Fed. R. Evid. 1002.

B. The Deposit Copies Are Actually Just Additional Copies Of The Original, Legitimate Copies Of The CDs Being Proffered.

The Copyright Act requires that that, in the case of a published work as is at issue here, the copyright holder submit "two complete copies or phonorecords of the best edition" of the work being registered. 17 U.S.C. §408(b)(2). The "best edition" is "the edition, published in the United States at any time before the date of deposit, that the Library of Congress determines to be most suitable for its purposes." 37 C.F.R. §202.19(b)(1). This definition establishes that, contrary to Defendant's unsupported contention, the "deposit copy" is neither a master recording nor an "original" version of the CD. In fact, the requirement of the Copyright Act and the Copyright Office is to submit a copy of what has been published in the United States.

Moreover, a "complete copy or phonorecord" is defined to include "all elements comprising the applicable unit of publication of the work." 37 C.F.R. §202.20(b)(2)(ii). In the case of a CD available for retail sale, the applicable unit of publication would be the CD itself, as sold, including packaging, casing, sleeve, and liner notes. Or, in this case, the legitimate CDs being proffered into evidence. That deposit copies are simply published versions of the CDs and are equally "original" as the legitimate copies is supported by the Certificates of Registration themselves. The Certificates of Registration contain a SKU number contained on legitimate copies of the album under “Title of the Work.” *See e.g.*, THE WRITING’S ON THE WALL/ by DESTINY’S CHILD (CK 69870). The SKU in the case of Writing’s on the Wall is 69870.[2]

Additionally, it was the standard practice of the Copyright Office from the mid-1980’s until just a few years ago that, for published works, deposit copies were disposed of after five years. Therefore, because the Copyright Office purges its deposit copies after five years, as a routine practice, the original is not obtainable and, as such, the published copies should be admitted under Fed. R. Evid. 1004.

IV. THE LEGITIMATE COPIES OF THE CDS ARE ADMISSIBLE AS DUPLICATES

Even if the legitimate copies are not "original" but rather "duplicates," Fed. R. Evid. 1003 deems a duplicate admissible to the same extent as the original unless "a genuine question is raised as to the authenticity of the original or . . . [unless] it would be unfair." Fed. R. Evid. 1003. The opponent of the evidence bears the burden of showing that a genuine issue exists as to its authenticity. *See United States v. Garmany*, 762 F.2d 929, 938 (11th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986); *United States v. Georgalis*, 631 F.2d 1199, 1205 (5th Cir. 1980). Here, Defendant has not proffered even a scintilla of evidence that the deposit copy varies in any way from the legitimate CDs being proffered. As Defendant has failed to make any sufficient showing of a genuine issue as to authenticity or unfairness, the legitimate copies must be admitted as duplicates. Fed. R. Evid. 1003; *United States v. Georgalis*, 631 F.2d at 1205; 11 J. Moore Federal Practice § 1003.02 (2d ed. 1976). Moreover, there is no question regarding

[2] Occasionally, when an older album is reissued (typically when a vinyl album is reissued as a CD), the new configuration is given a new inventory number. In those instances, the number listed on the copyright certificate will not match the number on the most recent version of the album available in stores.

substantial similarity and so it would not be "unfair to admit the duplicate in lieu of the original." Fed. R. Evid. 1003.

As the commentary to Rule 1003 explains:

> Rule 1003 departs from the common law in providing that a duplicate (as defined in Rule 1001(4)) is admissible to the same extent as an original unless a genuine question is raised as to the authenticity of the original or it would be unfair to admit the duplicate under the circumstances of a particular case. In essence, someone opposing the introduction of a duplicate must show some good reason why the original should be produced. *See, e.g., United States v. Mulinelli-Navas*, 111 F.3d 983 (1st Cir. 1997) (a duplicate of a check was admissible where the defendant "failed to elicit any testimony or make any proffer suggesting that the original had been tampered with or altered in any way and that the copy was not what it purported to be"). Duplicates and originals are ordinarily interchangeable.

Stephen A. Saltzburg, *et al., Federal Rule of Evidence 1103 Commentary,* available at LEXIS U.S.C.S. Fed. Rules Evid. R. 1103

In *United States v. Stockton*, 968 F.2d 715, 719 (8th Cir. 1992), the Eighth Circuit held that photographs of papers found in a government search were admissible under Rule 1003 as duplicates because no genuine question was raised as to their authenticity. This case is analogous and exactly on point. Just as photographs of papers in *Stockton* were admissible as evidence of the contents of the papers themselves, the legitimate copies of the CDs are admissible as evidence of the contents of the recordings themselves.

Moreover, "[g]iven the liberality of Article 10, the Trial Judge should err on the side of admitting the duplicate, leaving it to the jury to consider the possibility that the original might not be genuine or that the duplicate might be inaccurate or incomplete." *Saltzburg, Federal Rule of Evidence 1103 Commentary*. This is because "the purpose of the best evidence rule is to prevent inaccuracy and fraud when attempting to prove the contents of a writing." Fed. R. Evid. 1001 advisory committee's note. In this case, there is no legitimate dispute that the CDs

Plaintiffs are proffering differ in any way from the deposit copy. This is bolstered by the fact that for the CDs at issue the SKU on the Certified Certificates of Registration is identical to the SKU on the CDs being offered into evidence.

Finally, to the extent the Court believes there remains a question, that question is within the province of the jury, not the Court and the evidence is admissible. Fed. R. Evid. 1008 ("when an issue is raised ... (b) whether another ... recording . . . produced at trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.").

In conclusion, for the foregoing reasons, Defendant's Motion should be denied.

Respectfully submitted this 15th day of June 2009.

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I hereby certify that on June 15, 2009, I caused the following documents:

Brief In Opposition to Defendant's Motion to Exclude Evidence of the Sound Recordings Registered with the Copyright Office

to be filed electronically with the Clerk of the Court through ECF, and that ECF will send an e-notice of the electronic filing to the following:

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None.

Dated: June 12, 2009

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